ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

RECEIVED
MAY 30 1997
Federal Communications Commission
Office of Secretary

To: The Commission

REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE

Of Counsel

Carolyn F. Corwin
Ellen P. Goodman
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Marilyn Mohrman-Gillis
Lonna M. Thompson
Association of America's
Public Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 887-1700

Technical Consultant

Carmel Ortiz
Skjei Telecom, Inc.
13400 Brookfield Drive
Chantilly, Virginia 22021
(703) 968-9830

Paula A. Jameson
Gregory Ferenbach
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5000

May 30, 1997

TABLE OF CONTENTS

SUMMARY

A number of the proposals made in the comments filed by other parties in this docket on April 28, 1997, would seriously undermine Congress's intent by substantially delaying the implementation of the Section 25(b) DBS provisions. Other proposals would rewrite the set-aside obligation in a manner that would discourage the access to DBS carriage Congress sought to provide for noncommercial educational program providers. The Commission should reject these proposals and move promptly to implement the Section 25(b) requirements through promulgation of rules that maximize the access of noncommercial educational programmers to DBS capacity.

The implementation of Section 25(b) has already been delayed more than four years. The Commission should reject the proposal of the Satellite Broadcasting and Communications Association ("SBCA") and others to delay implementation further to permit DBS providers to organize an industry clearinghouse. There is no need for a clearinghouse to establish criteria for use of the set-aside capacity or to screen noncommercial educational programming. The statute articulates the relevant criteria, and the Commission itself will provide any needed clarification in its rules. Individual DBS providers are capable of applying the statutory standards to select qualified noncommercial program providers for the reserved capacity. Any industry effort to produce a collective endorsement of high

quality noncommercial programming can proceed on a voluntary basis, with no need for delay in implementation of Section 25(b). The set-aside obligation should have an effective date no later than 60 days after the final rules are issued.

Various proposals to have the Commission essentially rewrite the terms Congress established for the set-aside requirement must also be rejected. It is clear that for-profit programmers and DBS providers themselves are not eligible to take advantage of the set-aside capacity. Proposals to give these entities access to the reserved capacity would undermine Congress's goals and should be rejected. There is also no basis for limiting the amount of the reserved capacity that could be used by any single qualified programmer. Congress did not propose such a constraint, and DBS providers' individual choices of qualified noncommercial programming are likely to yield diversity without the need for imposition of artificial constraints.

The Commission should also reject proposals to calculate the set-aside reservation based only on video channels offered to the public, a limitation that does not appear in the statute. The set-aside reservation should be calculated on the basis of total available channel capacity, including capacity used for audio and data services and for duplicate programming, and regardless of whether or not the DBS provider chooses to use all of the capacity at any given point in time.

The proposals of SBCA and DBS providers to expand the categories of costs used as the basis for computing maximum rates that may be charged to noncommercial programming providers should be rejected. Congress specifically limited the categories of costs on which rates for access by noncommercial programmers could be based in an effort to make DBS access affordable for noncommercial entities. If noncommercial programming providers were required to help fund large fixed costs, such as the DBS providers' expenses of launching and operating satellites, Congress's intent in enacting Section 25(b) would be largely undermined.

Finally, the Commission should reject the proposal of SBCA and various DBS providers to limit the set-aside reservation to 4 percent of each DBS provider's capacity. No DBS provider has offered any persuasive legal justification for such a limitation. In view of the significant expansion in capacity of DBS systems in recent years, the Commission should set the reservation at the upper end of the range Congress provided, i.e., at 7 percent of total capacity. If an individual DBS provider can show special circumstances that would justify a lower percentage, the Commission could grant a temporary waiver of the 7 percent requirement until the provider was in a position to expand its capacity to the current capacity levels of the major DBS systems.

There is no basis for further delay in the implementation of Section 25(b). The Commission should move promptly to

promulgate rules that will provide meaningful access to DBS systems for those noncommercial educational entities that Congress sought to assist when it enacted the set-aside obligation.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 93-25**
	)	
Direct Broadcast Satellite Public Service Obligations	)	

To: The Commission

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
AND THE PUBLIC BROADCASTING SERVICE

The Association of America's Public Television Stations ("APTS") and The Public Broadcasting Service ("PBS") submit these Reply Comments in the above-captioned proceeding. As with the Comments APTS and PBS filed on April 28, 1997, these Reply Comments focus primarily on Section 25(b) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), which requires direct broadcast satellite ("DBS") providers to reserve a certain amount of their capacity for noncommercial programming of an educational or informational nature.

As explained below, a number of proposals put forward in the April 28 filings of other parties, particularly in the filings of DBS providers, would seriously undermine Congress's intent by substantially delaying the implementation of Section 25(b) or otherwise rewriting the provision in a manner that would

discourage the access to DBS carriage Congress sought to provide for noncommercial educational programming providers. These proposals must be rejected. The Commission should move promptly to implement the Section 25(b) requirements through promulgation of rules that maximize the access of noncommercial educational programmers to DBS capacity.

I. THE PROPOSAL TO DELAY IMPLEMENTATION OF SECTION 25(b) FURTHER WHILE DBS PROVIDERS ORGANIZE AN INDUSTRY CLEARINGHOUSE MUST BE REJECTED.

As explained in the April 28 APTS/PBS Comments, implementation of Section 25(b) should not be delayed further. That provision has now been the law for more than four and a half years. During that time, the DBS industry has developed quickly, demonstrating remarkable success in gaining subscribers and developing the technology needed to offer hundreds of channels of programming. Implementation of DBS providers' obligation to set aside a small percentage of their capacity for noncommercial educational uses is long overdue.

Despite the lengthy delay that has already occurred, the Satellite Broadcasting and Communications Association ("SBCA") and several other commenters now propose a further delay of two years, pushing off implementation of the set-aside obligation to the end of the century. The primary rationale offered for this further delay is the claim that DBS providers need time to set up an organization that would establish criteria

and screen programming to ensure that it is eligible for the set-aside.[1]

The industry clearinghouse proposal is completely gratuitous and clearly does not justify a delay in the implementation of Section 25(b). There is simply no need to have a clearinghouse as a prerequisite to enforcement of the set-aside obligation. Indeed, the entire clearinghouse proposal appears to be a red herring whose only purpose is delay.

There is absolutely no reason for the Commission to mandate an industry clearinghouse to establish eligibility criteria for the set-aside capacity. These criteria are described on the face of the statute. Eligible programming is that supplied by "national educational programming suppliers," a group that is further defined in the statute. See Act § 25(b)(3), (5)(B). To the extent there may be any uncertainty regarding the meaning of the statutory eligibility criteria, the

---

[1] See, e.g., SBCA Further Comments, pp. 5-6, 13; DirecTV Supplemental Comments, pp. 8, 13-16; Primestar Further Comments, pp. 19-24, 26-27; USSB Further Comments, pp. 6-7, 8.

The need to negotiate new program contracts with noncommercial programmers, also mentioned by SBCA and the others as a justification for delay, does not require deferring implementation of the set-aside requirement for any significant period of time. The process of negotiating contracts with noncommercial programmers should be reasonably straightforward. Similarly, the process of putting in place channel configurations and notifying subscribers should not take more than a few weeks. See, e.g., 47 U.S.C. § 535(g)(3) (requiring 30 days' advance notice of repositioning of a public television station on a cable system).

Commission itself should clarify those criteria in its rules. It should not delegate that function to an industry group.

Nor is there any need for an industry group to screen programming. Individual DBS providers are perfectly capable of applying the statutory criteria on their own.[2] Moreover, any mandatory screening by an industry-controlled clearinghouse would be particularly objectionable in light of the clear statutory prohibition on exercise by DBS providers of editorial control over programming provided for the set-aside capacity. See Act § 25(b)(3). The Commission clearly should not be in the position of granting approval to such a process of screening by the industry.[3] While APTS and PBS do not object to affording DBS providers the option to choose among qualified programmers (see April 28 APTS/PBS Comments, pp. 48-49), the Commission should make clear that any industry effort to influence the actual

---

[2] SBCA itself acknowledges that individual DBS providers could grant access to noncommercial programming other than the "pool" programming to be certified by the proposed industry clearinghouse. See SBCA Further Comments, pp. 5-6. Thus, the clearinghouse would be essentially a voluntary mechanism, without authority to enforce the criteria it establishes.

[3] Moreover, there is some danger that such a mechanism for collective industry action could be used for anticompetitive ends. For example, if DBS providers perceived certain noncommercial programming as a threat to their own programming ventures, they might hold up approval of the noncommercial programming for anticompetitive reasons, rather than on the basis of whether it qualifies for the reserved capacity under the statute.

If SBCA is suggesting that the Commission itself should sponsor the screening function, the proposal could raise problems under the First Amendment.

content of programming, through a clearinghouse or otherwise, is inconsistent with the statute.

If the function of the proposed industry clearinghouse is merely to provide an endorsement of high quality noncommercial programming, there is certainly no need to incorporate it into the Commission's rules. DBS operators and their organizations are free to enter into voluntary agreements relating to programming endorsements without authorization from the Commission.

The proposed industry clearinghouse is obviously an inappropriate subject for inclusion in the Commission's rules. The only apparent rationale for discussion of the proposal in the DBS operators' comments is to provide a basis for delaying implementation of the set-aside obligation. Of course, delay would not be limited to the two-year period supposedly required to set up the clearinghouse and get its operations underway.[4] Following the leisurely process of setting up the clearinghouse, it would take additional time for the new group to "certify" a

---

[4] Even with the two-year delay sought by SBCA and its members, there is no certainty that the proposed industry clearinghouse would become a reality. Several commenters stress that full industry participation is essential to the viability of the proposal. See, e.g., DirecTV Supplemental Comments, p. 14; SBCA Further Comments, p. 6. However, ASkyB and Echostar have not joined in the SBCA Comments (see id. at 2 n.1), and it is unclear whether they endorse the clearinghouse proposal. Even if there were agreement on the clearinghouse concept, there is no guarantee that DBS providers would be able to agree on details of implementation.

substantial body of programming. This additional time could be significant, particularly if some members had an incentive to move slowly. If DBS providers were free to avoid filling the reserved capacity until enough "certified" programming became available, the set-aside obligation might never be fully implemented.

If the DBS industry, for its own benefit, wishes to create an organization that will help its members identify qualified noncommercial programming, it is free to do so on a voluntary basis. However, any effort to create such a clearinghouse -- which could have commenced long ago if DBS providers really believed it was a good idea -- should not delay the obligation of individual DBS providers to comply with the set-aside requirement.[5] Implementation has been delayed far too long already. The Commission should set the effective date of the set-aside obligation no later than 60 days after the final rules are issued.

---

[5] Other suggestions for clearinghouses for noncommercial programming (e.g., the mandatory Programming Consortium proposed by DAETC, et al.) should also be rejected. At least for the time being, the Commission should permit individual DBS providers to choose the noncommercial entities that will supply programming for the set-aside capacity, subject to the limitations provided in the statute and the Commission's rules. This is the regulatory approach that is most consistent with Congress's policy to "rely on the marketplace, to the maximum extent feasible, to achieve [the] availability [to the public of a diversity of views and information]." Act § 2(b)(2). If reliance on the decisions of individual DBS providers results in repeated abuses, or if intractable disputes with respect to allocation of capacity develop, the Commission can revisit this subject at a later point.

II. THE COMMISSION SHOULD REJECT THE EFFORTS OF SOME PARTIES TO REWRITE THE SET-ASIDE REQUIREMENT.

In Section 25(b), Congress spoke clearly regarding the contours of the set-aside obligation. For example, Congress specified the types of programmers that would be eligible to use the set-aside capacity and the types of costs on which maximum rates charged for use of the capacity could be based. Nevertheless, some parties urge the Commission to depart from what Congress specified. In addition, a number of parties ask the Commission to impose restrictions where Congress chose not to do so.

The Commission should reject these invitations to rewrite the set-aside requirement. While the Commission may resolve any ambiguities and elaborate on requirements stated in the statute, the rules it promulgates must be consistent with Congress's mandates regarding the contours of the set-aside obligation.

A. The Capacity Congress Reserved for Nonprofit Entities May Not Be Appropriated by For-Profit Programmers, DBS Providers Themselves, or Other Groups That Fall Outside the Categories Specified by Congress.

The evident purpose of the set-aside for noncommercial programming is to ensure that some amount of DBS carriage is available to bona fide nonprofit educational program providers such as public television and educational institutions. This purpose parallels the goal underlying the cable must-carry provisions applicable to public television. In both cases, the

statute ensures access to programming that might not otherwise be available to viewers of a particular communications medium.

Despite the clarity of Congress's intent in enacting the DBS set-aside requirement, various for-profit programmers, as well as DBS providers themselves, argue that they, too, should be able to take advantage of the set-aside capacity.[6] These arguments are inconsistent with both the statutory language and Congress's goals and should be rejected.

As explained in the April 28 APTS/PBS Comments (see pages 13-15), Congress was explicit in defining the types of entities that would be eligible to use the set-aside capacity. DBS providers are required to reserve a portion of their capacity "exclusively for noncommercial programming of an educational or informational nature." Act § 25(b)(1) (emphasis added). The statute further states that a DBS provider "shall" meet this requirement "by making channel capacity available to national educational programming suppliers." Id. §25(b)(3) (emphasis added). Congress defined the term "national educational programming supplier" to include several categories of programming

---

[6] See, e.g., Encore Media Corp. Comments, pp. 5-12 (seeking inclusion of Encore's WAM! network); America's Health Network Comments, pp. 5-6; SBCA Further Comments, pp. 8-9; Primestar Comments, p. 23; Tempo Satellite Comments, pp. 11-12 & n.18.

Some commenters go even farther, arguing that there should be limits on the percentage of the set-aside capacity used by certain nonprofit programmers, such as PBS. These arguments are addressed in the following section.

providers -- public television stations, "other public telecommunications entities," and educational institutions. Id. § 25(b)(5)(B).[7] There is no indication that Congress intended to extend access to the set-aside capacity to groups other than those it specifically named in the definition.

In particular, neither the language nor the legislative history of Section 25(b) provides any basis for the position that for-profit entities are entitled to use the noncommercial set-aside.[8] All three of the categories of programmers specifically named in the statute are by definition nonprofit entities. Moreover, interpreting the statute to give for-profit programmers access to the set-aside capacity would clearly undermine Congress's intent in creating the set-aside. Unlike nonprofit programmers, which are oriented toward under-served audiences, for-profit programmers seek mass audiences, or niches that they

---

[7] As described in the April 28 APTS/PBS Comments, reservation of DBS capacity for these "national educational programming suppliers" is consistent with the long history of Congressional support for public television, including Congress's enactment of various provisions to ensure carriage of public television on all appropriate telecommunications media. See April 28 APTS/PBS Comments, pp. 7-10.

[8] Some commenters interpret the term "noncommercial" to mean an absence of commercial messages. However, Congress has used this term to refer to entities that are not driven by commercial, profit-making incentives. See, e.g., 47 U.S.C. § 615*l*(1) (defining "qualified noncommercial educational television station"). The categories Congress specified in defining the term "national educational programming supplier" make clear that Congress's goal was to provide DBS access for nonprofit entities with an educational mission, not simply to ensure that programming would be commercial-free.

expect to be profitable. For-profit programmers have little need of government assistance in order to gain carriage on DBS systems, and Congress identified no significant government interest that would support provision of such assistance to them. Moreover, to the extent for-profit programmers were permitted to access the set-aside capacity, the nonprofit programmers for whom the set-aside was designed would likely be squeezed out. Clearly, for-profit programmers are not included in the group Congress had in mind when it concluded that a noncommercial set-aside was needed.

It is also clear that Congress did not intend to give DBS providers themselves the right to use the set-aside capacity for their own programming. On its face, the statute requires DBS providers to "reserve" or "set aside" capacity, i.e., to hold it for use by others. If Congress had intended to permit DBS providers themselves to fill the capacity in question, there would have been no need to require them to "reserve" it. Moreover, Congress's policy to promote availability of a diversity of information sources (see Act § 2(b)(2)) would be defeated if DBS providers could fill the set-aside capacity with their own programming.[9]

---

[9] As noted in the April 28 APTS/PBS Comments, DBS providers are free to include in their services educational or informational programming supplied by for-profit programmers or supplied by the DBS providers themselves. However, they may not use such programming to satisfy the set-aside obligation.

The self-serving suggestions that for-profit entities and DBS providers themselves should be eligible to fill the noncommercial set-aside capacity represent a serious perversion of Congress's intent.[10] If Section 25(b) could be reinterpreted in this manner, there would be little opportunity for public television and educational institutions -- the intended beneficiaries of the set-aside requirement -- to gain DBS carriage. The Commission should reject such efforts to divert the set-aside capacity to groups Congress did not intend to assist.

---

[10] ASkyB's suggestion that political candidates and political parties should qualify to use the set-aside capacity should also be rejected. See American Sky Broadcasting Comments, pp. 18-19. There is no conceivable basis for the argument that these entities qualify as "national educational programming suppliers" or that political advertisements constitute "noncommercial educational or informational programming." Airing of political advertisements pursuant to requirements under Section 25(a) should not operate to reduce the amount of capacity reserved for noncommercial use under Section 25(b). ASkyB also suggests (ASkyB Comments, p. 18) that the Corporation for Public Broadcasting would be a qualified entity, but CPB is prohibited by statute from "producing programs, scheduling programs for dissemination, or disseminating programs to the public." 47 U.S.C. § 396(g)(3)(B).

In addition, the Commission should reject the suggestion of Dominion Video Satellite that religious programmers are entitled to use the set-aside capacity. Religious broadcasters do not qualify for grants from the Corporation for Public Broadcasting, and they are not generally regarded as "public telecommunications entities." Nor do they ordinarily have education as their primary mission, as do the categories of programmers specified by Congress in Section 25(b). There is no suggestion in the statute or legislative history that Congress intended to provide this discrete group with access to the set-aside capacity.

B. There Is No Basis for Limiting the Amount of the Reserved Capacity That Can Be Used by Any Single Qualified Programmer.

Some commenters propose that the Commission set limits on the amount of the reserved capacity that could be used by any single program provider or group of program providers.[11] Several commenters argue specifically that limits should be placed on the amount of programming PBS could provide.[12] These proposals are without basis in the statute and should be rejected.

While Congress defined various features of the set-aside obligation with specificity, it did not suggest that there should be a limit on the amount of capacity used by any particular noncommercial programmer or group of programmers. Neither the statute nor the legislative history even hints at such a limitation. Thus, there is no statutory basis for the Commission to impose such a constraint by rulemaking.

Nor is there any valid policy reason that would support such an inflexible rule. Some nonprofit entities, such as PBS, offer a rich variety of high quality educational programming and are particularly well suited to provide programming for the set-

---

[11] See, e.g., SBCA Comments, p. 8; ASkyB Comments, p. 19; DAETC et al. Comments, pp. 16-17; Research TV Comments, pp. 19-21; Alliance/NATOA Comments, p. 14.

[12] See, e.g., SBCA Comments, p. 8; ASkyB Comments, p. 19; Alliance/NATOA Comments, p. 14.

aside capacity. DBS providers should be free to fill as much capacity as they wish with programming from these sources.

Several commenters who propose limitations on the amount of reserved capacity to be used by particular programmers argue that such limitations are needed to promote diversity of programming sources on DBS.[13] However, DBS providers' individual choices of qualified noncommercial programming are likely to yield diversity without the need for imposition of artificial constraints. Particularly if the set-aside requirement is set at 7 percent of total capacity, it will be virtually impossible for any single programmer to fill the entire set-aside capacity. Moreover, any regulation that placed limits on the allocation of the set-aside capacity among qualified program providers would conflict with Congress's policy of "rely[ing] on the marketplace, to the maximum extent feasible," to achieve availability of a diversity of information sources. See Act § 2(b)(2).

C. The Set-Aside Reservation Should Be Calculated on the Basis of Total Available Channel Capacity.

SBCA and several individual DBS providers argue that the set-aside reservation capacity should be calculated on the basis of video channels offered to the public.[14] Among other things, they would exclude from the capacity base audio channels,

---

[13] See, e.g., DAETC, et al. Comments, p. 16; Research TV Comments, p. 20.

[14] See, e.g., DirecTV Supplemental Comments, p. 6 & n.11; Primestar Further Comments, pp. 13-16; SBCA Further Comments, pp. 9-10.

data channels, and channels carrying duplicate programming. In addition, these commenters apparently would not count any DBS capacity that is available but unused.

The proposed exclusions are inconsistent with the language of Section 25(b). Under Section 25(b)(1), a DBS provider must reserve "a portion of its channel capacity" for noncommercial programming. The term "channel capacity" is not qualified; thus, it refers to all capacity, including audio and data channels and any channel that duplicates another channel. Moreover, the term "capacity" ordinarily refers to all available capacity, not simply channels that the DBS provider chooses to use at any given time.

As support for the argument that only video channels should be counted for purposes of computing the set-aside, at least one commenter notes that the term "video programming" is used at various points in Section 25(b).[15] For example, the set-aside obligation applies to "a provider of direct broadcast satellite service providing video programming." Act § 25(b)(1). However, the reference to "video programming" in some parts of the statute actually reinforces the conclusion that Congress did not limit the types of channels that were to be counted when it defined the set-aside obligation. Congress could easily have required that a DBS provider reserve a portion of its "video

---

[15] See, e.g., Primestar Further Comments, p. 14.

channel capacity," but it did not include such a limitation in that sentence of the statute.

Of course, video programming is a prominent part of DBS service, and Congress may have assumed that DBS capacity would be filled primarily with video programming. However, the use of digital technology allows a much broader range of choices. Increasingly, audio and data services are becoming important and profitable features of some DBS services. Particularly in the context of business uses, data services are a significant complement to video programming, permitting the downloading of data files (e.g., agendas, reading materials) to be used with a particular video program. Moreover, the capacity that a DBS provider chooses to use for audio and data services at a given point in time can be converted to video services. Indeed, if such capacity were not counted for purposes of the set-aside, a DBS provider could deliberately introduce non-video services in order to reduce the amount of its set-aside obligation and later switch that capacity back to video programming. In any event, there is no reason not to count all capacity in determining the total on which the noncommercial reservation is to be computed, not simply the capacity the DBS provider elects to use for video purposes.

Moreover, noncommercial educational program providers may well wish to offer audio and data services of their own through DBS. Data services in particular can provide an

important complement to educational video programs. For example, in connection with a telecourse, a viewer could download test materials, take the test, and mail it to the professor. A syllabus or class reading materials could also be provided with a telecourse. In addition, a program provider could allow a viewer to download material from the Internet as one feature of a video course.[16] The flexibility to use capacity in these ways significantly expands the ability of public television and educational institutions to provide important educational and informational services to DBS viewers. Noncommercial educational program providers, like DBS providers themselves, should be free to use available digital capacity for any format.

The April 28 APTS/PBS Comments (pages 39-42) suggest that total DBS capacity be described in terms of Megabits per second, a measure that encompasses all of a provider's capacity, whatever the use to which it is put at any given time. Capacity expressed in terms of Megabits per second can be computed regardless of, e.g., the DBS provider's current choice of compression ratio or its decision between offering a high definition picture or offering several standard video channels or audio or data channels. This flexible measure of total capacity is far preferable to a measure that has the effect of limiting

---

[16] At least one DBS provider recognizes the potential for such services. See USSB Further Comments, p. 7 (referring to provision of personal computer Internet-like access to meet educational needs).

the amount of capacity available for noncommercial use based on the DBS provider's choices about how to deploy its capacity.

There is also no reason to exclude duplicate channels from the total capacity base. To the extent a DBS provider finds it necessary to offer duplicate programming (due to, e.g., its use of two half-CONUS orbital slots), a noncommercial entity is likely to need the same capability. If duplicate channels are provided as a convenience to subscribers, there also should be no effect on the set-aside. The capacity available to noncommercial program providers should not be reduced simply because a DBS provider chooses to offer duplicated programming.

Likewise, the fact that a DBS provider chooses not to use all of the capacity available to it at any point in time should not operate to reduce the set-aside capacity. Capacity that is not in use one day may be filled with programming the next day. In any event, there appears to be no technical reason why a DBS provider could not make available for noncommercial use a percentage of its unused capacity. Indeed, if capacity will otherwise remain unused, the burden of making it available for noncommercial use should be relatively light. The set-aside should be computed on the basis of all available capacity, not just the channels offered to the public at a point in time.

D. The Commission Should Reject the Efforts of DBS Providers to Expand the Categories of Costs Used to Compute Maximum Rates Charged to Noncommercial Entities.

Congress specified in Section 25(b) that rates DBS providers charge to program providers using the noncommercial capacity should be no greater than 50 percent of the "total direct costs" of making the capacity available. Act § 25(b)(4)(B). The statute states explicitly that in calculating total direct costs the Commission must exclude "marketing costs, general administrative costs, and similar overhead costs" of the DBS provider. Id. § 25(b)(4)(C). The legislative history further explains that "[d]irect costs include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite." H.R. Rep. No. 102-628, 102nd Cong., 2d Sess. 125 (1992). As explained in the April 28 APTS/PBS Comments (pages 22-24), in view of this legislative guidance, the Commission's rules should state that the term "direct costs" is limited to the incremental (or marginal) costs DBS providers incur as a direct result of carrying the programming of qualified noncommercial entities.

Despite the obvious clarity of the statute and legislative history, the DBS providers seek to saddle noncommercial programming providers with a share of large fixed costs that have nothing to do with the narrow categories of costs Congress described. The industry would have noncommercial programmers help to underwrite, among other things, the costs of launching,

insuring, and operating satellites, as well as engaging in research and development.[17]

The arguments of the DBS providers are wholly inconsistent with Congress's purpose in prescribing limits on rates. Congress's intent under Section 25(b) clearly was to minimize the economic burden on noncommercial programming providers, thereby providing them with a realistic opportunity to use the reserved capacity. The Conference Report states that "[t]he pricing structure was devised to enable national educational programming suppliers to utilize th[e] reserved channel capacity." H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 100 (1992). Congress obviously recognized that nonprofit entities have limited financial resources and that they would be unable to afford market rates for DBS carriage.

Even using the narrow definition of "direct costs" provided by Congress, it is doubtful whether some noncommercial programming providers will be able to afford DBS carriage. The addition to the rate base of huge fixed costs -- costs the DBS provider would incur whether or not it was required to carry noncommercial programming -- would certainly make it impossible for most noncommercial entities to take advantage of the reserved capacity. If DBS providers succeed in incorporating these large fixed costs into the maximum rates to be paid by noncommercial

---

[17] See, e.g., SBCA Further Comments, p. 15; Primestar Further Comments, pp. 25-26; DirecTV Supplemental Comments, p. 17.